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No. 96-31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

EVELYN SMITH,

Petitioner,

—v.—

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS and GAIL RANDALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHRISTIAN LEGAL SOCIETY, CHRISTIAN MEDICAL AND DENTAL SOCIETY, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., THE SOUTHERN BAPTIST CONVENTION–CHRISTIAN LIFE COMMISSION AND THE UNION OF AMERICAN HEBREW CONGREGATIONS IN SUPPORT OF THE PETITION FOR CERTIORARI

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to the Supreme Court of California

MOTION FOR LEAVE TO BRIEF *AMICI CURIAE OF* THE AMERICAN JEWISH CONGRESS, *ET AL.*

The American Jewish Congress, Baptist Joint Committee on Public Affairs, Christian Legal Society, Christian Medical & Dental Society, Church of Jesus Christ of Latter-day Saints, National Association of Evangelicals, National Council of the Churches of Christ in the U.S.A., Southern Baptist Convention-Christian Life Commission and the Union of American Hebrew Congregations respectfully move for an order permitting

them to file the attached brief *amici curiae*. The Petitioner consented to movants' request for leave to file. Respondents have not responded to that request.

Each of the *amici* represents thousands of religious believers whose rights under the Religious Freedom Restoration Act are adversely affected by the judgment below. In the instant brief they demonstrate that the language, intent, and legislative history of RFRA all mandate a reversal of the judgment below that Evelyn Smith was not burdened by a law requiring her to rent her property to an unmarried couple.

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BRIEF *AMICI CURIAE OF*

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IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF THE *AMICI*

The organizations filing this brief likely disagree on the question of whether the Religious Freedom Restoration Act ("RFRA") ultimately protects a landlord from refusing to rent apartments to unmarried couples. That is to say, they disagree about whether a state's ban on such discrimination furthers a narrowly drawn compelling interest.

These organizations are all agreed, however, that the holding of the California Supreme Court that landlord Evelyn Smith had not crossed the RFRA threshold of establishing the existence of a "substantial burden" on her religious practice, 42 U.S.C. § 2000bb, because she could earn a living in some other way, is unsustainable and inconsistent with the language, intent and legislative history of the Act. Because the general adoption of a reading so limiting RFRA would frustrate an Act of Congress of utmost importance to millions of Americans, the judgment merits review by this Court.

***

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews and all Americans. It has long fought against all forms of discrimination, including housing discrimination. It has also taken a particular interest in the Establishment and Free Exercise clauses, because in its view, these clauses

are indispensable safeguards for the religious liberty of American Jews.

***

The Baptist Joint Committee on Public Affairs is composed of representatives from various cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise clauses is essential to ensure the religious liberty of all Americans.

The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches.

Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

***

The Christian Legal Society (CLS) is a national association of over 4,500 attorneys, law students and judges. Through its local membership and its Center for Law and Religious Freedom in Annandale, Virginia, CLS is committed to the protection of religious liberties for all citizens of the United States, regardless of religious background. Since 1976, CLS has written numerous *amicus* briefs to the U.S. Supreme Court and others to ensure that the high standard of protection granted religious free exercise in the U.S. and state constitutions continues.

***

Founded in 1931, the Christian Medical & Dental Society (CMDS) today represents over 11,000 members–primarily practicing physicians representing the entire range of medical specialties. These members share a common commitment to the principles of biblical faith and the integration of these principles with professional practice.

We view such principles as essential to protecting the lives and best interests of our patients, our conscientious practice of medicine according to long-standing Hippocratic and religious principles, and to preserving the public respect accorded to physicians as guardians of health and life. The freedom to exercise these convictions in the practice of medicine and

dentistry—both in treatment of patients and as managers of private practices—is vital to each of our members.

***

The Church of Jesus Christ of Latter-day Saints is an unincorporated religious association headquartered in Salt Lake City, Utah. Church membership exceeds 9.5 million with more than 20,000 congregations located throughout the world. Firmly embedded in the tradition and teachings of the LDS Church are the concepts of religious freedom and toleration: "We claim the privilege of worshipping almighty God according to the dictates of our own conscience and allow all men the same privilege, let them worship how, where, or what they may." Article of Faith, No. 11.

***

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, and individuals. NAE includes 42,500 churches from 73 denominations, and 295 para-church ministries. Through its commissions and affiliates, such as the World Relief Corporation and the National Religious Broadcasters, NAE serves an evangelical constituency of about 27 million people.

The NAE has joined in many *amicus* briefs in defense of religious freedom, our First Liberty. NAE was an important part of the coalition that labored for passage

of the Religious Freedom Restoration Act. The pinched interpretation of what constitutes a "substantial burden" of the court below threatens to gut RFRA. NAE believes we are our brother's keeper and that a state court should not be allowed, in effect, to disregard a remedial act of Congress enacted pursuant to the Constitution.

***

The National Council of the Churches of Christ in the U.S.A. is a "community of communions" composed of thirty-four national religious bodies—Protestant, Anglican and Orthodox—having an aggregate membership in the United States of over 52,000,000, through which the member bodies work together on a wide range of activities that further Christian unity, witness to their faith and serve people throughout the world. The National Council was one of the early supporters of the legislation that became the Religious Freedom restoration Act, and it strongly presses this effort to persuade the Court to correct the California Supreme Court's misunderstanding of the scope and force of that Act.

***

The Southern Baptist Convention ("SBC") is the nation's largest Protestant denomination, with over 39,900 local churches and 16.5 million members. Christian Life Commission ("CLC") is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national

conventions over the years regarding the primacy of the principle of religious liberty as contained in the religion clauses of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases such as this one.

***

The Union of American Hebrew Congregations is the synagogue arm of the Reform Jewish movement, representing some 850 congregations and 1.5 million members nationwide. As strong supporters of the Religious Freedom Restoration Act, we believe that the opinion below greatly undermines congressional intent that RFRA be a meaningful check on government intrusion on religious practice. We join this brief with a wide array of other religious organizations to demonstrate, together, the danger the decision below poses to RFRA. We do so mindful of the complexity of the underlying issue, and with the understanding that we will, in nearly every case, find that enforcement of anti-discrimination laws will, in fact, be a compelling state interest.

ARGUMENT

I. PETITIONER ESTABLISHED A BURDEN WITHIN THE MEANING OF RFRA

The notion that a landlord whose faith prohibits her from facilitating out-of-wedlock cohabitation is not "substantially burdened," 42 U.S.C. § 2000bb-1(a) by an order requiring her to do so is, on its face, odd. It is a reading wholly inconsistent with the plain meaning of the Religious Freedom Restoration Act, its purposes and its legislative history. Correcting the narrow interpretation of the court below gave the statutory phrase "substantial burden" is of critical importance, for that decision effectively frustrates enforcement of an act of Congress.

The problem is not just that the court below arguably decided this case in favor of the wrong party. What particularly demands this Court's attention is that the California Supreme Court has taken an act of Congress designed to be a broad statutory charter of liberty and read it grudgingly, as if it were an insignificant administrative regulation or a lifeless, embarrassing and inconvenient relic of some long-ago era.

A. The Decision Below Defies The Plain And Literal Meaning Of the Statute

The dictionary defines a "burden" as something that is difficult to bear.[1] The thesaurus lists, *inter alia*, the following synonyms for "burden": disadvantage, penalty, or impediment.[2] For the landlord whose religion prohibits facilitating sin by allowing her property to be used sinfully, it is surely difficult to bear the state's command that she choose between her livelihood and her faith. Such an official command, backed by fines and the coercive power of the state, is likewise a penalty for implementing a religious practice. The judgment below enforcing the anti-discrimination law in preference to Evelyn Smith's faith-driven practices, at once disadvantages the practitioner of religious beliefs and serves as a significant impediment to their implementation in practice.

The California Supreme Court attempted to avoid RFRA's command that this substantial burden be justified by a compelling interest, 42 U.S.C. § 2000bb-1(b), on the untenable ground that Mrs. Smith was under no religious duty to earn her living as a landlord. It reasoned that since she could choose some other investment with which to support herself, she suffered no impediment to her

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1. American Heritage Dictionary (2d College ed. 1982).

2. Roget's International Thesaurus (3rd ed. 1962) at p. 483.

religious practice, and was not penalized for her beliefs, when she was told she could not conduct her real estate business consistent with her religious principles. Although it suggested that there might be some cases in which the availability of an alternative way of earning a livelihood would not defeat a burden claim, it did not suggest what rules might define the boundary between those statutes regulating economic activity that did create a burden and those that did not. None readily suggests itself.

Apparently, the court below would have reached the same result had the state insisted that Jehovah's Witness landlords take a religiously objectionable oath, required Amish landlords to paint their houses "worldly colors," forced a Catholic landlord to rent space to an abortion clinic, or compelled Orthodox Jews to let space to Jews for Jesus to mount a campaign to convert Jews to Christianity. If it is inconceivable that these claims would be dismissed on the ground that they presented no substantial burden, no conflict between religion and secular law, it is equally inconceivable to hold that Mrs. Smith was not burdened when she was ordered to conduct her business in ways that conflicted with her faith.

The court below believed that, by abandoning the rental housing business, Mrs. Smith could honor her religious beliefs against facilitating fornication, earn a living, and still abide by the prohibition on discrimination. There being no conflict, in the court's view, there was no need to apply the compelling interest test. The premise of

its decision seems to be that for RFRA purposes, a "substantial burden" exists only if the claimant had no way at all of avoiding the conflict, no matter what price avoidance imposed on the believer.

This construction is plainly wrong. A state which imposes on believers a choice between earning a living and compliance with religious beliefs inevitably creates a "substantial burden," *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Put otherwise, the state has compelled Evelyn Smith to forfeit the right to be a landlord because of her religious practice, surely a substantial burden on her religious practice.

The business of renting housing is perfectly legal in California. Evelyn Smith might have chosen this profession for any number of reasons—because it is known to her, because it is lucrative, because she already owned rental properties, or because it is neither time-consuming nor physically burdensome. In a free society, people are at liberty to choose their professions without unnecessary governmental interference. Surely, average citizens would think themselves "substantially burdened" if told that their religion was an impediment to participation in a legal enterprise. They might or might not ultimately prevail under RFRA, but they would be substantially burdened, if that language is to be given its ordinary meaning, indeed, if it is to be given any meaning.

RFRA stakes out a broad reach. It provides that it applies to "all federal and state laws." 42 U.S.C. § 2000bb-3(a). The California Supreme Court has inserted a gloss, limiting "all ... laws" to those whose reach cannot be avoided by giving up an otherwise lawful activity or which are engaged in for profit.[3] Had Congress intended such a limit, it would have inserted it.

B. The Pre-*Smith* Case Law Indicates That Mrs. Smith Has Been Substantially Burdened

The meaning of the statute is confirmed by a review of cases predating *Employment Division v. Smith*, 494 U.S. 872 (1990) cases discussing what constitutes a burden on the free exercise of religion. Those cases are properly considered in light of the statutory intent to replicate the law as embodied in *Sherbert*, 42 U.S.C. § 2000bb(b)(1), and the command of the legislative history that courts look to pre-*Employment Division v. Smith* case law as a starting point for statutory interpretation. S.REP. 103-111 at pp. 8-9 (103rd Cong., 1st Sess.) (hereafter "Senate Report").

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3. By way of comparison, the freedom of the press in both constitutional and statutory forms (*e.g.*, shield laws) is available to those who engage in these activities for financial gain. See, *e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct 1495 (1996);*NY Times v. Sullivan*, 376 U.S. 254 (1964); *Delaney v. Super. Ct.*, 50 Cal.3d 785, 268 Cal.Rptr. 753, 789 P.2d 934 (1990); *In Re Willam*, 1996 W.L. 418712 (1996) (California's press shield law).

The seminal case on burden is *Sherbert v. Verner*, *supra*. See 42 U.S.C. § 2000bb(b)(1). As is the case here, the conflict in *Sherbert* was purely an economic one. Ms. Sherbert was faced with the choice of giving up her unemployment benefits or accepting Sabbath work. The Court found that the South Carolina statute denying benefits to persons who refused work even for religious reasons coerced Sherbert to abandon her faith:

> The ruling forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

374 U.S. at 404.

California has confronted Evelyn Smith with exactly the same dilemma. It forced her to choose between an otherwise legal source of income and her religious practice. Since RFRA is modeled on *Sherbert*, it should have been too plain for argument that Mrs. Smith, like Mrs. Sherbert, was burdened by application of a law making her faith and her livelihood irreconcilable.

The California Supreme Court, thought, however, that because Mrs. Smith could support herself with other investments, her situation was not comparable to Sherbert's. That court overlooked the fact that Sherbert too, could have looked for work other than the mill work she knew. She also could have relocated to where she might have found acceptable work. She did not, but that did not affect the result. 374 U.S. at 399, n.2.

The cases the court below relied upon to sustain its ruling that there was no burden on Smith will not bear the weight assigned them. In *Braunfield v. Braun*, 336 U.S. 599 (1961), this Court confronted the claim that a Sunday closing law burdened the religious practices of kosher butcher store operators who closed their stores on Saturday for religion reasons by requiring them to close on Sunday as well. The butchers argued that the law put them at a competitive disadvantage with non-kosher butchers whose religious observances coincided with the mandatory Sunday closings and were able to transact business six, not five, days a week.

This Court found no burden on free exercise. The blue law did not prohibit the practice of Saturday Sabbath observance, but only marginally increased the economic consequences of such observance. For this very reason, the Senate Report accompanying RFRA notes that RFRA would not bar the application of fire codes to churches because such codes did not prohibit or restrain the

religious activity of the church; they merely increased the cost of doing business. Senate Report at 9, n.16.

This Court has likewise found no burden in free exercise challenges to facially neutral tax laws. These taxes (which the Court was careful to note were not the economic equivalent of a prohibition on the religious activity) simply added to the economic cost of doing business, but did not prohibit or otherwise regulate a particular activity. And unlike the sales tax at issue in *Jimmy Swaggert Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990), where the burdens fell in the first instance on purchasers and not the Ministries, the economic burden of the ban on marital status discrimination falls directly on Mrs. Smith.

California has not just made the rental housing business more expensive for Mrs. Smith. It has not just added to her economic cost of doing business. It has made that business wholly incompatible with her religious practices It is as if Maryland ordered kosher butchers to open on Saturday in violation of their religion.

The second case relied on was *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303-05 (1985). There a religious foundation challenged the application of the minimum wage laws to its social service program associates. The Foundation did not assert that it had a religious doctrine proscribing payment of the minimum wage. Instead, it argued that its employee-

adherents' religious beliefs prevented them from enriching themselves at the Foundation's expense.

This Court found no burden on the Foundation's (or its associates') religious freedom. It so held not because the associates could find other, non-employment opportunities to serve the Foundation, nor yet because the activity was commercial or because it merely made the conduct of the Foundation's religious activities more expensive. Instead, it held that because the associates could simply return their excess wages to the church and comply fully with their religious beliefs against enriching themselves at the church's expense, there was no impediment at all to the full exercise of the associates' religious beliefs.

In *Alamo* there simply was no clash between the dictates of law and conscience. Both could be satisfied without either yielding to the other. "It is virtually self-evident that the Free Exercise Clause does not require excusal ... unless, at a minimum, [a law] actually burdens freedom." *Id.* at 303. By simply turning over their wages to the church, the associates' religious obligations were met, the Foundation fully complied with the law and the associates could continue their work.

No such cost-free escape is available to Mrs. Smith. She cannot both conduct her business and comply with the dictates of her faith. She cannot rent to unmarried couples

and comply with her religious views forbidding her to do so.

Before *Employment Division v. Smith*, courts confronted various claims that application of anti-discrimination laws to businesses owned by religious proprietors burdened their religious practices in violation of the Free Exercise Clause. These claims always passed the threshold of a substantial burden. Each then proceeded to discuss questions of compelling interest. Thus, for example, the Ninth Circuit found a burden in a case in which an employer had been ordered not to require employees to attend prayer sessions. *EEOC v. Townley Engineering and Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). Similarly, other courts have found burdens on religious liberty with enforcement of anti-discrimination laws in circumstances similar to those presented here. *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska), cert. denied, 115 S.Ct. 460 (1994) (Thomas, J., dissenting from denial of certiorari); *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994).

Congress intended pre-*Smith* free exercise cases to be a general guide to the interpretation of RFRA. Senate Report at 8-9. See *Grosz v. City of Miami Beach*, 82 F.3d 1005, 1007 (11th Cir. 1996). Those cases, coupled with the plain language of the statute, should have led to a different result here.

C. The Legislative History Demonstrates That Mrs. Smith Was Burdened

The idea that religious practice needed broad, wide-ranging and substantial protection in the era of the regulatory state enjoyed such broad and unquestioned support in Congress that the legislative history is sparse. That near-unanimous concern with protecting the believer from thoughtless, needless and cavalier regulation itself cautions against a construction of the statute which would leave the economic lives of citizens beyond its reach. After all, the statute plainly says that it "applies to all Federal and State law." 42 U.S.C. § 2000bb-3(a) [emphasis added], a formulation that includes statutes regulating economic activity. As the House Judiciary Committee explained:

> All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions in this bill. ... [I]n order to violate the statute, government need not coerce individuals into violating their religious beliefs ... nor penalize religious activity by denying any person an equal share of the rights, benefits or privileges enjoyed by any

> citizen. Rather, the test applies wherever a law burdens a person's exercise of religion. [emphasis added]

H.R.REP. 103-88 at 6 (103rd Cong. 1st Sess.)

RFRA's supporters called Congress' attention to a number of burdens on religious practice which *Employment Division v. Smith* left wholly unprotected and wholly exempt from the special justification which *Sherbert* and *Wisconsin v. Yoder*, 406 U.S. 205 (1971) required. During the several years in which RFRA was under consideration, several witnesses and the Congressional Research Service pointed out the problem of landlords who would not rent to unmarried couples as exemplifying the type of case which previously was subject to compelling interest analysis and which would be again if RFRA were adopted. D.M. Ackerman, The Religious Freedom Restoration Act of 1993: A Legal Analysis, 26-27 (1992), citing *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990); *John v. Donahue*, 2 Cal.Rptr.2d 32 (Ct. App. 2d Dist. 1991); Religious Freedom Restoration Act of 1990: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, U.S. House of Representatives, on H.R. 2797, 102nd Cong., 2d Sess. at 58-59 (1992) (statement of Rep. Kopetski) (hereafter "House Hearings"); Hearings Before the Senate Comm. on the Judiciary, on S.2969, 102nd Cong., 2d Sess. at 54 (1992) (statement of J. Brent Walker) (hereafter "Senate

Hearings"). See also H.R.REP. 103-88, *supra*, at 16, n.6, (defining protection from certain forms of discrimination as compelling interest).

Others mentioned problems which, under the rationale of the court below, would not impose a burden. Witnesses cited *St. Agnes Hospital v. Riddick*, 748 F.Supp. 319 (D. Md. 1990), in which a district court considered a Catholic hospital's expulsion from an obstetrics residency program because it would not permit residents to perform abortions. See, *e.g.*, House Hearings at 157 (statement of Professor Laycock); Senate Hearings at 66 (same). Professor Laycock argued that *Employment Division v. Smith* left such hospitals without recourse. There, too, the hospital and its student doctors could earn their living without obstetrics and gynecology training. And the residents could also go into some other line of work. The judgment below would presumably exclude such cases from the scope of RFRA.

Nothing in the legislative history suggests that these examples, and others like them, were to be excluded from the class of "all Federal and State laws" within the scope of RFRA. This is not surprising because Congress thought it was adopting *Sherbert* standard in statutory form and *Sherbert*, as we have shown, leads ineluctably to the conclusion that Mrs. Smith has been burdened.

To be sure the decision below reflects of the now discredited right-privilege doctrine. But that doctrine was

definitively rejected in *Sherbert*. The House Committee report makes plain that RFRA reached privileges as well as rights, H.R.REP. 103-88, *supra*, p. 6. It defies reason to suppose that a Congress concerned with protecting the practice of religion along the lines of *Sherbert* would revive the right/privilege distinction which that decision discarded.

To be sure, on the Senate floor Senator Hatch moved the addition of the adjective "substantial" to the word "burden", but that change has no relevance here. The amendment was stated by its sponsor not to work any major change in the legislation. The Committee report had consistently referred to RFRA being triggered by a "substantial burden". The change was intended only to bring the bill into conformity with *Sherbert*, which likewise spoke of substantial burdens. CONG.REC. S14352 (October 26, 1993).

What little other evidence there is suggests that the sponsors used the phrase "substantial burden" (a phrase drawn from *Sherbert*) with the intention not of excluding landlords and other commercial entrepreneurs from the scope of RFRA, but of writing out fact patterns on all fours with decisions where the claimant thought to invoke the Free Exercise Clause to restrain internal governmental processes. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1987); *Bowen v. Roy*, 476 U.S. 673 (1986).

Senator Hatch explained that the amendment was intended only to make the Act conform to the *Sherbert* model, a model we have shown is inconsistent with the decision below:

> RFRA does not effect *Lyng v. Northwest Indian Cemetery Protective Assn.*, a case concerning the use and management of Government resources, because the incidental impact on a religious practice does not constitute a cognizable burden on anyone's free exercise of religion .... [There] the court ruled that the way in which government manages its affairs and uses its own property does not constitute a burden on religious exercise. .... Unless a burden is demonstrated, there can be no free exercise violation. The statutory language in RFRA was drafted to include protection against laws which impose a burden on religious exercise.

CONG.REC. S14365 (October 26, 1993). He continued:

> RFRA would have no effect on cases like *Bowen v. Roy*, involving the use of social security numbers, because the incidental impact on a religious practice does not constitute a cognizable burden on anyone's free exercise of religion. Unless such a

> burden is demonstrated, there can be no free exercise violation. Thus, a claimant never gets to the compelling interest test where there is no burden. RFRA language intentionally includes terminology requiring a burden on one's exercise of religion. [citations omitted]

Id.

The phrase "substantial burden" also implies a command to the courts to weigh the quantum of the burden. Although that command has raised problems of interpretation and application for the courts, compare, *e.g.*, *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996) with *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995), there can be no question that banning those persons who believe fornication sinful from renting their properties in keeping with their beliefs exceeds any conceivable test of substantial burden. This is particularly so because sexual mores are at the heart of much of contemporary religious debate, as the ongoing disputes in many churches on sexuality issues plainly attests. See R. Wuthnow, The Restructuring of American Religion (1988).

II. A BURDEN TO THIRD PARTIES DOES NOT OBVIATE THE EXISTENCE OF A SUBSTANTIAL BURDEN ON A CLAIMANT

The California Supreme Court also found that Mrs. Smith's religious exercise was not burdened because recognizing a burden on her would "detrimentally affect the rights of third parties." *Amici* readily agree that the fact that a particular accommodation casts a burden on third parties is important to the question of whether there exists a compelling state interest. It is surely relevant to that inquiry to know whether a proposed accommodation will shift heavy burdens to others. Compare *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) with *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). But it is neither logically nor legally relevant to the question of whether Mrs. Smith's exercise of her religion is burdened that Respondents would be burdened if she were accommodated.

If a burden on a third party was an absolute bar to a free exercise claim, *Corporation of the Presiding Bishop v. Amos*, *supra*, was wrongly decided. There, the Court upheld against an Establishment Clause challenge a statute permitting religious organizations to discriminate on the basis of religion in employment. That statute permitted a church to fire an employee who was not in good standing with the church. Rejecting the employee's Establishment Clause challenge to the statutory exemption, this Court

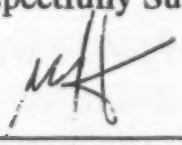
emphasized that it furthered Free Exercise Clause values by removing a burden of government regulation from the church. But on the reasoning of the California court, there could have been no cognizable burden on the church because the exemption burdened others.

CONCLUSION

Amici do not contend that the ultimate resolution of this case is easy. It touches on matters crucial to government, the protection of competing individual liberties and important religious values. Our complaint is precisely that the California Supreme Court made this hard case easy by imposing on RFRA a restriction that is not in the statute. This Court should set the statute free of the constricted reading given it by the California Supreme Court.

The petition for certiorari should be granted

Respectfully Submitted,



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